91-1671

No. 91_

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

V.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does ERISA § 502(a)(2) and/or (a)(3), 29 U.S.C. § 1132(a)(2) and (3), allow pension plan participants and beneficiaries to bring an action on behalf of a retirement plan for recovery of monetary losses against a non-fiduciary service provider who knowingly participates in breaches of fiduciary duty committed by an ERISA fiduciary?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the petitioners sued two other parties: the Kaiser Steel Retirement Plan ("Plan"), and the Pension Benefit Guaranty Corporation ("PBGC"), which had terminated the Plan pursuant to ERISA's distress termination provisions. Petitioners sued the PBGC in its capacity as the Plan's statutory trustee. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it. The district court granted Hewitt's motion for dismissal of the PBGC's cross-claim as "derivative" of the complaint. *Sua sponte*, the district court also dismissed the Plan and the PBGC "since no distinct allegations were directed against them. . . ." (A28). The PBGC did not appeal on behalf of the Plan or itself as the statutory trustee.

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V.
HEWITT ASSOCIATES, an Illinois Partnership, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 4, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 948 F.2d 607, and is reprinted in the appendix hereto, p. A1, *infra*.

The memorandum decision of the United States District Court for the Northern District of California (Patel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A17, *infra*.

JURISDICTION

On January 15, 1992, the court of appeals denied a timely petition for rehearing (A15), after first granting the Secretary of Labor's Motion for Leave to File her Brief Amicus Curiae in support of rehearing *en banc*. (A14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 409(a), 29 U.S.C. § 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

ERISA § 502(a), 29 U.S.C. § 1132(a) provides in relevant part:

> A civil action may be brought --
>
> (1) * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violated any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
>
> (4) * * *
>
> (5) * * * by the Secretary (A) to enjoin any act or practice which violates any provision of this

> title, or (B) to obtain other appropriate relief (i) to redress such violation or (ii) to enforce any provision of this title;
>
> (6) * * *

ERISA § 502(l), 29 U.S.C. § 1132(l) provides:

> (1) In the case of (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) -- (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).
>
> (3) The Secretary may, in the secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that (A) the fiduciary or other person acted reasonably and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.
>
> (4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax

imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

The court of appeals in this case held that ERISA does not afford pension plan participants a cause of action against the plan's actuary for knowingly participating in breaches of fiduciary duty committed by the plan's fiduciaries which resulted in the distress-termination of the underfunded plan. The court's decision, consistent with its earlier opinion in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1984), conflicts directly with the reported decisions of the Second, Sixth, Seventh, and District of Columbia Circuit Courts of Appeal. All of these courts have recognized the liability under ERISA of non-fiduciaries for knowingly participating in a fiduciary breach. Only the Eleventh Circuit Court of Appeal agrees with the Ninth Circuit in refusing to recognize non-fiduciary liability under ERISA for such aiders and abetters of ERISA fiduciary breaches.

Upon taking over the Plan pursuant to ERISA's distress termination provision, 29 U.S.C. § 1341, the PBGC stated through its Executive Director that "The company's funding of the plan was grossly inadequate to pay the benefits promised . . . ." (*BNA Pension Reporter*, p. A-5, March 11, 1987). As a result of the Plan's "gross" underfunding, the petitioners, all long-term management employees of Kaiser Steel, suffered substantial reductions in their monthly pension benefits.[1]

[1] Petitioner Mertens suffered a reduction in his monthly pension from $2,016.00 to $521.00, petitioner Bandrowski from $1,907.00 to $670.00, petitioner Clarke from $2,567.00 to $1,103.00 and petitioner Franz from $1,426.00 to $478.00. (A3; R.E. 21:10-19).

The court of appeals opinion sets forth petitioners' allegations against Hewitt Associates ("Hewitt"), the actuary for the Kaiser Steel company, which it accepted as true in reviewing the district court's dismissal of the action against Hewitt pursuant to F.R.Civ.P. 12(b)(6):

> . . . Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.
>
> The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.
>
> According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions, Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions. (A2-A3).

The petitioners further alleged: that Hewitt did actuarial work for Kaiser Steel at the same time it performed services for the plan; that Hewitt did not want to jeopardize its lucrative professional relationship with Kaiser; and that it failed to disclose to plan administrators its relationship with Kaiser or

the potential conflict that the relationship created. (A3).

Petitioners asserted three separate legal theories under ERISA against Hewitt:

(a) Hewitt breached its fiduciary duties to the Plan;

(b) Hewitt knowingly participated in a breach of fiduciary duty; and,

(c) Hewitt breached its actuarial duties to the Plan. (A3).

Petitioners also alleged that Hewitt committed professional malpractice under California law and invoked the Court's pendent jurisdiction. (A3).[2]

The district court had subject matter jurisdiction over petitioners' claims under 29 U.S.C. § 1132(e), and the Declaratory Judgment Act, 28 U.S.C. § 2201. It had pendent jurisdiction over the state law malpractice claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966).

On March 7, 1990, Hewitt moved to dismiss the Complaint under F.R.Civ.P. 12(b)(6) on the grounds that the Complaint failed to state a claim for which relief could be granted and that the applicable California statute of limitations barred plaintiffs' pendant state law claim for professional malpractice.

On August 9, 1990, the district court dismissed all of petitioners' claims and entered judgment in favor of respondent. (A27-28). The district court held that Hewitt

[2] The petitioners also alleged that Hewitt engaged in a prohibited party-in-interest transaction (R.E. 27:17-28:11). The district court dismissed this claim; plaintiffs did not appeal that dismissal.

could not be held responsible for losses suffered by plaintiffs because: (1) The Complaint did not allege sufficient facts to warrant a finding that Hewitt acted as a fiduciary under ERISA; (2) ERISA provides no remedy against a non-fiduciary who participates in a breach of fiduciary duty; (3) ERISA provides no remedy for Hewitt's alleged breach of professional actuarial duties; and (4) the applicable statute of limitation barred plaintiffs' state law malpractice claim.

Petitioners filed a timely Notice of Appeal on August 25, 1990. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. In its November 4, 1991 decision, the Ninth Circuit affirmed the dismissal of all of petitioners' ERISA-based claims, but reversed and remanded the district court's dismissal of petitioners' pendent state professional malpractice claim. (A13). Petitioners ask the Court to review only the court of appeals holding, based on *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), that non-fiduciaries are not liable under ERISA for knowingly participating in fiduciary breaches.[3]

The court rested this holding on its conclusion that Congress' enactment of the Omnibus Budget Reconciliation Act ("OBRA") of 1989 and its addition of a new ERISA enforcement provision, 29 U.S.C. § 1132(l), did not clarify Congress' intent to permit suits by pension plan participants or beneficiaries against non-fiduciaries who knowingly aid and abet a fiduciary in the commission of a breach of fiduciary duty.[4] (A6-A8).

[3] This petition does not raise two of petitioners' ERISA-based claims: (1) that Hewitt breached its fiduciary duties to the Plan (A4-A6) and (2) that Hewitt breached its actuarial duties to the Plan (A9-A11).

[4] ERISA § 502(l), 29 U.S.C. § 1132(l), enacted on November 21, 1989, requires the Secretary of Labor to assess a civil penalty in the case of, *inter alia*, "any knowing participation in [a fiduciary] breach or violation [of ERISA] by any other person." The penalty constitutes a percentage of the total recovery from "a fiduciary or other person with respect to a breach

Noting that section 1132(l) applies "to the Secretary only, not to plan participants" (A8), the Ninth Circuit, citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), declined to read the recent Congressional enactment as indicating that, contrary to *Nieto*, sections 502(a)(3) and (5), 29 U.S.C. §§ 1132(a)(3) and (5), had always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his ERISA duties. (A8). Rather, the court believed that the amendment *created*, for the first time, a cause of action by the *Secretary* against non-fiduciaries under §§ 502(a)(3) and (5), but not on behalf of plan participants and beneficiaries. (A8).

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION BELOW, IN CONFLICT WITH DECISIONS OF FOUR OTHER CIRCUIT COURTS OF APPEAL, UNDERMINES THE CONSISTENT AND UNIFORM NATIONAL APPLICATION OF ERISA'S REMEDIAL PROVISIONS

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). As this Court noted, by enacting ERISA, Congress intended to "preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* at 99, citing 120 Cong. Rec. 29933 (1974) (remarks of Sen. Harrison Williams). The Ninth Circuit's decision to follow *Nieto* conflicts with the decisions of four other courts of appeal and the decisions of the vast majority of district courts which have addressed the issue of non-fiduciary liability under ERISA.

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or violation" in an action instituted by the Secretary pursuant to ERISA § 502(a)(2) or (5), 29 U.S.C. § 1132(a)(2) or (5). *See* discussion A15-19.

The courts which have recognized the liability of non-fiduciaries have held that ERISA incorporates this principle from trust law. ERISA's legislative history confirms that Congress intended to incorporate into ERISA fiduciary principles developed in the law of trusts. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). In light of this legislative history, this Court has directed the lower courts to develop a "federal common law of rights and obligations under ERISA-regulated plan." *Firestone, supra* (quoting *Pilot Line Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Under the law of trusts, it is a well-established principle that a knowing participant in a fiduciary breach can be jointly and severally liable for the full amount of the loss sustained as a result of that breach.[5]

Although ERISA contains no provision specifically imposing liability on non-fiduciaries, that liability stems from the broad enforcement authority conferred upon participants, beneficiaries and fiduciaries by Section 502(a)(3) of the Act, 29 U.S.C. § 1132 (a)(3), and upon the Secretary of Labor by Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Under *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985), a court determining whether ERISA implies a cause of action against non-fiduciaries must apply the four-factor analysis in *Cort v. Ash*, 422 U.S. 66 (1975). Under *Cort*, a court may imply a cause of action in a statute if:

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[5] The elements of knowing participation in a fiduciary breach are "(a) an act or omission which furthers or completes the breach, and (b) actual or constructive knowledge at the time that the transaction amounted to a breach or the legal equivalent of such knowledge." *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1396 (D. Nev. 1984). See also, *Thornton v. Evans*, 692 F.2d 1064, 1078, n. 34 (7th Cir. 1982) ("[a] necessary element of plaintiff's claims against the non-fiduciary defendants is that they conspired with the fiduciaries. . . ."); G. Bogert, *The Law of Trusts and Trustees*, § 901, at 258-259 (rev. 2d ed. 1982).

(1) the plaintiff is one of the class for whose benefit the statute was enacted;

(2) there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;

(3) such a remedy would be consistent with the underlying purposes of the legislative scheme; and

(4) it is appropriate to infer a cause of action based solely on federal law.
(Id. at 78).

Cort factors one and four undisputedly favor an implied cause of action. The courts which have found legislative intent favoring a cause of action against non-fiduciaries look to the civil enforcement provisions of section 1132, 29 U.S.C. §§ 1132(a)(3), 1132(a)(5), which allow private parties and/or the Secretary of Labor to bring an action to enjoin any act or practice that violates the terms of ERISA or the terms of the plan, and to obtain "other appropriate equitable relief." These courts then inferred from section 1132 and from ERISA's legislative history that Congress intended ERISA to federalize the common law of trusts.[6] This analysis is consistent with

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[6] *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (principals in, and affiliates of, corporation which breached fiduciary duties held liable as knowing participants in breach); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (non-fiduciary liable for assisting fiduciary co-defendant in scheme to cause plans to use assets in ways which benefited defendants); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (*dictum*); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982) (holding, on a motion to dismiss, that a non-fiduciary, alleged to have conspired with a fiduciary to mislead other fiduciaries into taking action which harmed plan, can be held liable under ERISA); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) ([A]lthough Klepak was not a statutory fiduciary, he was, as the district court held, jointly liable

the directive in *Firestone, supra*, 489 U.S. at 110, that courts develop a "federal common law of rights and obligations under ERISA-regulated plans."

Under the law of trusts, it is a well-established principle that a knowing participant in a fiduciary breach can be jointly and severally liable for the full amount of the loss sustained as a result of that breach. See G. Bogert, *The Law of Trust and Trustees*, §§ 868, 901 (rev. 2d ed. 1982); 4 A. Scott, *The Law of Trusts*, §§ 290-295, 321-326 (3d ed. 1967 & Supp. 1985); *Restatement (Second) of Trusts*, §§ 290-297, 321-326 (1959).

In arriving at a result contrary to that reached by the vast majority of courts addressing the issue of ERISA non-fiduciary liability, the Ninth Circuit in *Nieto* concluded from the liability provisions of section 1109(a) (which provides that "[a]ny person who is a fiduciary" shall be "personally liable" for any breach of fiduciary duty) that had Congress intended to include non-fiduciaries, it would have done so explicitly. *Nieto*, 854

. . . as a non-fiduciary who knowingly participated in a breach of trust") (citations omitted); *Brock v. Gerace*, 635 F. Supp. 563, 568 (D. N.J. 1986) (holding, on motion to dismiss, that non-fiduciaries may be liable even where they did not directly deal with fiduciaries); *Foltz v. U.S. News and World Report*, 627 F. Supp. 1143, 1167-8 (D. D.C. 1986); *Donovan v. Bryans*, 566 F. Supp. 1258, 1267 (E.D. Pa. 1983); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 642 (W.D. Wis. 1979) (liability imposed on non-fiduciaries who, despite being advised by their mutual attorney that plan trustees were breaching their duties in a transaction, ignored the advice and completed the transaction).

But *see Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991) (trying to reconcile *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), with *Nieto*, held that "a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute"); *Framingham Union Hospital, Inc. v. The Travelers Ins. Co.*, 744 F. Supp. 29 (D. Mass. 1990) (following *Nieto*); *Jordan v. Reliable Life Insurance Co.*, 694 F.Supp 822, 829-830 (N.D. Ala. 1988) (*dicta*).

F.2d at 871-874. The court moreover found that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 1109 superfluous, "a result contrary to the fundamental canons of statutory construction." *Id.* at 873.

However, it is clear from later Supreme Court decisions that *Nieto* read *Russell* too broadly when it concluded that the only remedies available to redress fiduciary breaches are those specifically enumerated in the statute. Since *Nieto*, the Supreme Court analyzed section 1132(a) generally, and section 1132(a)(3) in particular, in *Ingersoll-Rand Co. v. McClendon*, ___U.S. ___, 111 S.Ct. 478 (1990), and concluded that the remedial provisions of section 1132 are broad enough to encompass remedies which are *not* specifically enumerated. Although the Court in *Ingersoll* did not discuss in detail what remedies are available as "other appropriate equitable relief" under section 1132(a)(3), the Court, in reversing the judgment below, held that "there is no basis in § 1132(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.'" 111 S.Ct. at 468. The Court added: "It is clear that the relief requested" -- which included a prayer for compensatory damages -- "is well within the power of federal courts to provide." *Id.* Notably, an award of compensatory damages is not specifically enumerated as a remedy available under section 1132. In light of *Ingersoll-Rand*, it is apparent that the Ninth Circuit in *Nieto* and now in this case incorrectly applies *Russell* to support its holding that the *only* remedies available to redress fiduciary breaches are those specifically enumerated in the statute.

As noted, the Supreme Court also recently analyzed section 502(a) in *Firestone, supra,* in the context of an action seeking benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The court stated that since "ERISA abounds with the language and terminology of trust law," it would be "guided by principles of trust law" in determining the

appropriate standard of review of a benefit claims decision. *Firestone*, 489 U.S. at 111. The court noted that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," *id.* at 113, citing *Shaw v. Delta Airlines*, 463 U.S. at 90, and considered it unlikely that "ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

"A fundamental concept of a trust is that courts 'will give such remedies as are necessary for the protection of their interest.'" *Russell*, 473 U.S. at 156-157 (Brennan, J., concurring) (footnote omitted).

A cause of action against non-fiduciaries often is essential in order to deter violations of ERISA's fiduciary responsibility provisions and to ensure that plans have the means to attain complete recovery of all losses caused by such violations. Cf. *Brock v. Gerace,* 635 F. Supp. at 569 (plan's participants would be denied full relief if the Secretary were unable to recover from non-fiduciaries).

The Ninth Circuit also erred in *Nieto* when it focused almost entirely on section 409 of the Act, 29 U.S.C. § 1109, and section 502(a)(2), 29 U.S.C. § 1132(a)(2) (which, as noted, *supra*, authorizes actions to enforce section 409) and concluded that the plain language of the statute limited ERISA's coverage to fiduciaries only. *Nieto*, 845 F.2d at 871-874. The court concluded that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 409 superfluous. *Id.* However, as noted by Judge Wiggins in his opinion concurring in the judgment on other grounds, "By reading section 409(a), 29 U.S.C. § 1109(a), in isolation, [the

court] ignores the clear requirement of the Act to provide the broadest possible remedies under ERISA to plan beneficiaries." *Id.* at 875.

That Congress specified a fiduciary's liability in section 409 does not preclude construing the broad language of sections 29 U.S.C. §§ 1132(a)(3) and (5) to reach a wider class of persons who aid in the commission of a fiduciary breach. As Judge Wiggins also noted, section 409(a) "is simply one section among many that impose liability on those who violate the substantive provisions" of ERISA. *Id.*

Indeed, as Justice Brennan pointed out in his concurring opinion in *Russell*, "The legislative history demonstrates that Congress intended federal courts to develop federal common law *in fashioning the additional 'appropriate equitable relief,'*" provided for in sections 1132(a)(3) and (5). 473 U.S. at 156. (Emphasis added.) Justice Brennan further notes that "trust-law remedies are equitable in nature and include provision of money damages." (Citing trust law authorities.) *Id.* at 152 n. 10. The broad provision by Congress that federal courts provide "appropriate" equitable relief is a clear mandate to fashion all remedies which are appropriate to enforce the Act. It should be construed to include make-whole relief against non-fiduciaries who knowingly participate in bringing about violations of ERISA.

Furthermore, the decision in *Nieto* is internally inconsistent. Although the court refused to recognize a claim under the Act against a non-fiduciary knowing participant, it did rule that a non-fiduciary could be liable in an action brought pursuant to section 1132(a)(3) when the non-fiduciary acted as a "party in interest" (29 U.S.C. § 1002(14)(b)) and engaged in a prohibited transaction (29 U.S.C. § 1106(a)). The court acknowledged that the broad equitable relief provided in section 1132(a)(3) (and therefore section 1132(a)(5)) "is not limited to fiduciaries." *Id.* at 874. The court determined that

benefited from engaging in prohibited transactions, despite the fact that ERISA does *not* expressly bar parties in interest from engaging in prohibited transactions or explicitly provide relief from them for such actions. The court reasoned that "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Id.*

There is, furthermore, no basis in the language of section 1132(a)(3) or (5) to read those provisions so as to permit lawsuits against non-fiduciaries who engage in prohibited transactions, but not against those who knowingly participate in fiduciary breaches. The court's interpretation provides inadequate protection for employee benefit plans because not all non-fiduciary participants in fiduciary breaches are parties in interest and not all fiduciary breaches are prohibited transactions.

This case presents the Court with the opportunity to overrule *Nieto*, thereby resolving a major conflict and maintaining uniform enforcement of the Act.

II. CONGRESS' 1989 AMENDMENT OF ERISA, WHICH REQUIRED THE SECRETARY OF LABOR TO PURSUE CIVIL PENALTIES AGAINST NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES, CLARIFIED ITS ORIGINAL INTENT TO IMPOSE ERISA LIABILITY ON AIDERS AND ABETTERS OF FIDUCIARY BREACHES

The intent of Congress to include relief against knowing participants is clear from the enactment of the Omnibus Budget Reconciliation Act of 1989, which contained numerous amendments to ERISA. P.L. 101-239. These amendments added a new subsection ("l") to ERISA § 502, 29 U.S.C. § 1132, which requires the Secretary of Labor to pursue civil penalties against knowing participants in fiduciary breaches:

penalties against knowing participants in fiduciary breaches:

> In the case of --
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) **any knowing participation in such breach or violation by any other person**, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.[7]
> (29 U.S.C. §1132(l); emphasis added.)

The penalty referred to in section 1132(l) is "an amount equal to 20 percent of the applicable recovery amount." The term "applicable recovery amount" is defined at section 1132(l)(2) as "any amount which is recovered from a fiduciary or other person with respect to a breach or violation," pursuant to a settlement agreement, or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5). But there could be no such recoveries from non-fiduciaries unless those provisions already encompassed relief from non-fiduciaries. By so providing, the OBRA amendment gives rise to the inescapable presumption that the Secretary always had the power to institute litigation against non-fiduciaries under sections 1132(a)(2) and (a)(5).

Section 1132(a)(2) provides that suit may be brought by the Secretary *or* by plan participants for relief under 29 U.S.C. § 1109. Thus, if the Secretary may sue non-fiduciary aiders and abetters under section 1132(a)(2), then plan participants must also have the right to sue derivatively on behalf of the ERISA

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[7] Congress thought that the mandatory imposition of a civil penalty would deter potential breaches of fiduciary duty by fiduciaries and non-fiduciaries who knowingly assist them in such breaches. H.R. Conf. Rep. No. 101-386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. and Admin. News 3018, 3035-36.

plan.

Similarly, if the Secretary can bring an action against a non-fiduciary under subsection 1132(a)(5), then a plan participant must have the corresponding right to sue non-fiduciaries under subsection 1132(a)(3). The relevant language in subsections 1132(a)(3) and (a)(5) is identical; identical statutory language must be given the same effect. *See Firestone v. Howerton*, 671 F.2d 317, 320 n. 6 (9th Cir. 1982) ("when the same terms are used in different sections of a statute they receive the same meaning"); *Mid Jersey Trucking Industry Pension Fund v. Omni Funding Group*, 731 F. Supp. 161, 178 n. 11 (D.N.J. 1990) (treating sections 1132(a)(3) and (a)(5) as the same for purposes of implying a cause of action for knowing participation in a breach of fiduciary duty).[8]

In rejecting the foregoing analysis, the Ninth Circuit misconstrued the plain language of section 1132(l), which does not, as the court incorrectly concluded, *create* a new cause of action by the Secretary against aiders and abetters. Rather the amendment simply created a civil penalty provision which comes into play only if the Secretary has recovered money from a non-fiduciary either through settlement or through a section 1132(a)(5) judicial proceeding. Therefore, instead of creating a new cause of action against non-fiduciaries, section 1132(l) simply assumed that the underlying cause of action against non-fiduciary aiders and abetters already existed in section 1132(a). *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1968) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction").

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[8] Section 1132(l)(2)(B) also supports the conclusion that plan participants may institute an ERISA action against aiders and abetters of fiduciary breaches under either subsection 1132(a)(2) or (a)(3). *See Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1349 (10th Cir. 1987) ("the use of a disjunctive in a statute and regulations indicates that alternatives were intended").

Indeed, nothing in ERISA's remedial scheme, which vests virtually co-extensive enforcement rights in both the Secretary and participants, supports the Ninth Circuit's conclusion that Congress intended to afford the Secretary, but not private plan participants and beneficiaries, the exclusive right to recover against non-fiduciaries. As noted, the enforcement language in section 1132(a)(2) applies both to the Secretary and participants, and the language in subsection 1132(a)(3) (relating to participants and beneficiaries) is identical to that in 1132(a)(5) (relating to the Secretary).

Nevertheless, the Ninth Circuit declined to read the OBRA amendment to ERISA as indicating that section 1132, contrary to *Nieto*, always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his duties: "In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in Nieto. (Citations omitted.) We decline to do what Congress has refused to do." (A9).

The court observed that an early version of OBRA, H.R. 3299, would have added a new section 409(c), 29 U.S.C. § 1109(c), that explicitly stated that persons who knowingly participate in a breach of fiduciary duty "shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if they were a fiduciary committing such breach." H.R. 3299, 101st Cong., 1st Sess., § 3161(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). The report on H.R. 3299 states that the purpose of proposed section 409(c) was to resolve "the conflict in the courts of appeal by clarifying Congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans." H.R.Rpt. 101-247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Cong. Code. and Ad. News 1906, 1969-70.

However, Congress' omission in the final amendment of language explicitly overruling *Nieto* does not indicate approval

of *Nieto*. At the time Congress enacted OBRA, all of the other circuits which had addressed the issue of non-fiduciary liability had concluded that such liability existed under ERISA. The amendment that Congress did in fact pass clearly indicated that Congress approved these decisions as reflecting the correct interpretation of the statutory text as written. The amendment strengthens the statute as to non-fiduciary liability by imposing penalties in addition to allowing recovery for all losses against the non-fiduciary who participates in the breach of duty by a fiduciary. Therefore, to the extent that Congress may have failed to explicitly overrule *Nieto*, such "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *PBGC v. LTV Corp.*, ___ U.S. ___, 110 S.Ct. 2668, 2678 (1990) (quoting *U.S. v. Wise*, 370 U.S. 405, 411 (1962)).

In addition, section 1132(l)(3)(B) makes it clear that the phrase "appropriate equitable relief" in §§ 1132(a)(3) and (5) includes the remedy of restoration of "all losses to the plan." Under § 1132(l)(3)(B), the Secretary may waive or reduce the civil penalty if imposition of the penalty would interfere with the non-fiduciary's ability "to restore all losses to the plan without severe financial hardship." This waiver criterion would be meaningless if the non-fiduciary were not, in the first instance, liable for "all losses to the plan."

III. THE NINTH CIRCUIT'S NARROW CONSTRUCTION OF ERISA AND REFUSAL TO INCORPORATE NON-FIDUCIARY LIABILITY FOR KNOWINGLY PARTICIPATING IN A BREACH OF FIDUCIARY DUTY THREATENS EFFECTIVE PROTECTION OF EMPLOYEE BENEFIT PLANS

This Court should not let stand interpretations of ERISA which provide beneficiaries and participants with substantially

less protection than they had before ERISA was enacted. Prior to ERISA, under the law of trusts, courts imposed liability on third persons who knowingly assisted or participated in a breach of fiduciary duty. ERISA was a reform statute. It would be ironic if it were interpreted to provide less protection to pension plan participants and beneficiaries than they had before ERISA.

Liability of non-fiduciaries who knowingly participate in breaches of fiduciary duty is essential to the complete protection of participants and beneficiaries. Trustees often cannot carry out violations of ERISA without the active cooperation of third parties. Third party liability is also important to provide complete relief. The trustees may be judgment proof or otherwise not able to provide complete relief restoring fully all losses suffered by a plan. It is difficult to believe that Congress intended to eliminate this protection which was deemed essential even before the passage of ERISA. "[No] sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against non-fiduciaries." *Donovan v. Unicorn Group*, 3 Employee Benefits Cases 1665, 1667 (S.D.N.Y. 1982).

A. Under the Law of Trusts, Third Persons Who Knowingly Assist in Breaches of Fiduciary Duty Are Liable to the Trust Beneficiaries

The common law of trusts imposes liability on third persons who knowingly participate in a breach of trust. A trust beneficiary had a reasonable expectation that third persons had a corresponding duty not to knowingly participate in a breach of trust. *See* G. Bogert & Bogert, *The Law of Trusts & Trustees*, section 326 (1959) (third person who knowingly participates in breach of trust is liable to beneficiary for any loss thereby caused). *See also* Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 481 (1921) (trust law places liability on third person for knowingly participating with fiduciary in breach of trust).

At common law, "Courts will always impose liability for knowing participation in any fiduciary breach of duty." Comment, *Nieto v. Ecker, Incorporation of Nonfiduciary Liability Under ERISA*, 73 Minn. L. Rev. 1303, 1311 (1989). Prior to ERISA, both state and federal courts imposed such liability in order to fully protect trust beneficiaries. *See, e.g., Jackson v. Smith*, 254 U.S. 586, 589 (1920) (holding non-fiduciaries who joined fiduciary in sale of trust property to trustee jointly and severally liable for profits obtained); *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 498 (9th Cir. 1955) (stating that third person who colludes with fiduciary in committing breach of duty is under duty of restitution to beneficiary); *Whitford v. Reddeman*, 196 Wis. 10, 22, 23, 219 N.W. 361, 365-66 (1928) (recognizing court's power to enforce trust, complete trustee accounting, and hold liable those who assist trustee in violation of trust); *Massie v. Barth*, 634 S.W.2d 208, 211 (Mo. Ct. App. 1982) (holding that third party who has notice that trustee is committing breach of trust and participates with trustee is liable to beneficiary for any loss caused by breach of trust).

The imposition of non-fiduciary liability was thought important for the full protection of the beneficiary. Non-fiduciary third persons often participate in the trustee's breach of fiduciary duty.[9] Perhaps even more critical, fiduciaries

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[9] *See Jackson v. Smith*, 254 U.S. 586, 589 (1921) (third party participated in trustee's sale of trust property); *Carter Oil Co. v. Crude Oil Co.*, 201 F.2d 547, 551 (10th Cir. 1953) (non-fiduciary who knew co-tenant intended to misappropriate payments that should be shared by another co-tenant may be liable for participating in breach of trust); *Marshall v. Lovell*, 19 F.2d 751, 753 (8th Cir. 1927), *cert denied*, 276 U.S. 616 (1928) (trustee bribed by non-fiduciary); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971) (union participated in conspiracy with employee welfare fund trustees and bank president and knowingly allowed plan funds to be held in interest-free accounts); *Malmud v. Blackman*, 278 N.Y. 658, 658, 16 N.E.2d 391, 391 (1938) (*per curium*) (non-fiduciary borrower who accepted usurious loan from trustee held liable for all loss caused to estate); *Xagrans v. Cohn*, 404 Pa. 315, 319, 172 A.3d 291, 293 (1961) (non-

depend on active cooperation from non-fiduciary third parties to enable them to carry out breaches of fiduciary duty. *See, e.g.*, Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 19 (1934) (arguing violations of fiduciary duty do not usually occur without active assistance of others). It was against this background of common law liability that ERISA was enacted in order to provide even greater protection to the participants and beneficiaries of employee benefit plans.

B. Under ERISA, Third Party Liability for Participation in Breaches of Fiduciary Duty is Necessary for the Effective Protection of Participants and Beneficiaries

In interpreting and applying ERISA, most federal courts have recognized that rejection of non-fiduciary liability is inconsistent with the remedial purposes of the Act. The vast majority of federal courts have held that, in conformity with pre-ERISA trust law, ERISA includes a non-fiduciary liability standard for knowing participation in a fiduciary's breach of trust. *See Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *Dole v. Compton*, 753 F. Supp. 563, 565-569 (E.D. Pa. 1990); *Pension Ben. Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1008 (M.D. N.C. 1990); *Pension Fund-Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 176-179 (D.N.J. 1990); *Brock v. Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Donovan v. Bryans*, 566 F. Supp. 1258, 1266-1267 (E.D. Pa. 1983); *Donovan v. Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-642 (W.D. Wis. 1979). *See also Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) (court assumes but does not expressly determine the existence of such liability).

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fiduciary sellers who induced trustee to make illegal investment held jointly and severally liable for losses of trust property, when they knew or ought to have known of breach of trust although purchase was in name of trustee without trust label); *Whitford v. Reddeman*, 196 Wis. 10, 24, 25, 219 N.W. 361, 366 (1928) (third party aided trustee in deceiving beneficiaries of investment trust regarding financial stability of trust).

This incorporation of non-fiduciary liability is consistent with the entire history and purpose of ERISA. It was the need to better protect plan participants that spurred the passage of ERISA and inspired the Congressional mandate for the courts to develop a "federal common law" in the enforcement of ERISA. Congress envisioned that a "body of [f]ederal substantive law [would] be developed by the courts to deal with issues involving rights and obligations under private welfare pension plans." 120 Cong. Rec. 29942 (1974) (statement of Senator Javits), and that the federal courts would adapt trust law to the particular purposes of employee benefit plans. *See* S. Rep. No. 127, 93d Cong. 2d Sess. 29, reprinted in 1974 U.S. Code Cong. & Admin. News, 4838, 4865. While the statute was detailed, the courts were needed to give it flesh and blood in actual operation. "But Congress realized that the bare terms, however detailed, of these statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans." *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1988). *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) ("We have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated pension plans'").

The ability to hold third parties responsible for active participation in breaches of duty by fiduciaries is critical to the remedial purposes of ERISA. As mentioned above, non-fiduciaries participate in most fiduciary breaches. Furthermore, in many cases, fiduciaries simply will not be able to carry out such breaches without the active cooperation of third persons. The present case provides a vivid illustration of this fact. Petitioners allege that Hewitt, contrary to its professional responsibilities as the Plan's actuary, knowingly aided and abetted the fiduciaries in allowing the severe underfunding of the Kaiser Steel Retirement Plan. Hewitt acted so as not to jeopardize its lucrative professional relationship with Kaiser on other matters. As a consequence of Hewitt's acts and omissions, the PBGC was forced to terminate the Plan pursuant to ERISA's distress termination procedures. The petitioners and all of the other participants and beneficiaries of the Plan suffered substantial losses in their retirement income.

Courts have recognized, both before and after the enactment of ERISA, that non-fiduciary liability is necessary to provide complete relief to participants and beneficiaries of employee benefits. *See Brock v. Gerace, supra*, at 569: "In the present case, the Local 564 dental plan's participants and beneficiaries *would be denied full relief* if the secretary were unable to recover from [knowingly participating] non-fiduciaries . . . ." (emphasis added); *see also Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-642 (W.D. Wis. 1979) (plan fiduciaries permitted the plan to loan all of its assets back to the sponsoring companies in exchange for unsecured promissory notes); *Lowen v. Tower Asset Management Corp, Inc., supra*, 829 F.2d at 1220-1221 (recognizing necessity of non-fiduciary liability under ERISA to pierce corporate form and prevent channeling of profits from fiduciary breaches to non-fiduciary entities to insulate them from liability under ERISA).

Given that non-fiduciary liability is necessary to fulfill the purpose of ERISA to protect plan participants and

beneficiaries, surely the broad remedial provisions of ERISA encompass this basic remedy. The remedy is not incidental; it goes to the core of ERISA's protection. It is inconceivable that Congress intentionally meant to exclude it from the remedies a federal court may give in enforcing ERISA. "[N]o sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against non-fiduciaries." *Brock v. Gerace, supra*, 635 F. Supp. at 569.

CONCLUSION

For the reasons set forth above, petitioners urge that this Court grant the writ.

Respectfully submitted,

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TABLE OF APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
August 14, 1991 - Pasadena, California
Filed November 4, 1991

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*
Opinion by Judge Thompson

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

Plaintiffs, former employees of Kaiser Steel Corporation ("Kaiser") and participants in its ERISA qualified pension plan, brought this action against the plan's actuary, Hewitt Associates ("Hewitt"), for ERISA-based and pendent state claims. The district court dismissed all of the plaintiffs' claims and entered judgment in favor of Hewitt. We affirm the district court's dismissal of the ERISA-based claims, but reverse its dismissal of the pendent state law claim.

FACTS

On a motion to dismiss, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *Call v. Sumitomo Bank*, 881 F.2d 626, 630 (9th Cir. 1989). With this in mind, we state the following facts as alleged by the plaintiffs and take these facts as true for the purpose of deciding this appeal.

According to the plaintiffs, Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.

The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.

According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions,

Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions.

The plaintiffs further alleged that at the same time Hewitt was performing services for the plan, it was also providing actuarial services to Kaiser. Hewitt did not want to jeopardize this lucrative professional relationship. Hewitt failed to disclose to plan administrators its relationship with Kaiser and the potential conflict that the relationship created.

In October 1986,[1] the Pension Benefit Guaranty Corporation ("PBGC") determined that the plan was underfunded and incapable of paying its liabilities, including the pension benefits owed to the plaintiffs. As a result of the underfunding, the PBGC terminated the plan and began paying the plaintiffs and other plan participants substantially reduced benefits. For example, one plaintiff's monthly check was reduced from \$2,016 to \$521. Other plaintiffs suffered comparable reductions.

The plaintiffs' complaint alleged three causes of action: a cause of action based on ERISA for "breach of professional duties to the plan;" a cause of action based on ERISA for "unlawful party-in-interest transactions;" and a professional malpractice claim under California law. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it.

Hewitt filed a motion to dismiss the plaintiffs' complaint for failure to state a claim pursuant to Federal Rule of Civil

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[1] The appellants' opening brief stated that the 1986 date in the complaint is incorrect, and that the PBGC actually terminated the plan in February 1987. The resolution of this question is irrelevant to the outcome of this appeal. *See infra* note 10.

Procedure 12(b)(6). It argued that the entire complaint was barred by the statute of limitations and also that the ERISA claims were insufficient as a matter of law.

In their response to the motion, the plaintiffs asserted that their first claim actually stated three independent claims under ERISA: a claim for breach of fiduciary duty; a claim for knowing participation in a breach of fiduciary duty; and a claim for non-fiduciary breach of actuarial duties. They stood by their remaining claims.

In its order granting the motion to dismiss, the district court determined that the ERISA claims were insufficient as a matter of law. The court also held that the pendent state claim was barred by the applicable California limitation period. It dismissed the PBGC's claim as derivative. The plaintiffs did not seek leave to amend their complaint, and this appeal followed.[2]

DISCUSSION

A. Claim for Breach of Fiduciary Duty

An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A);[3] *Credit*

[2] The plaintiffs have not appealed dismissal of their ERISA claims for "unlawful party-in-interest transactions."

[3] 29 U.S.C. § 1002(21)(A) provides in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii)

Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987). A party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions.'" *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988), quoting *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

The district court held that the complaint failed to state a claim for breach of fiduciary duty because nothing in the complaint indicated that Hewitt had done anything other than render actuarial services to the plan. Further, nothing in the complaint indicated that Hewitt exercised control or authority over plan assets. Although the plaintiffs allege that Hewitt acted negligently, fraudulently, and reprehensibly as an actuary, no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary.

Although the courts have recognized the possibility that professional service providers can be liable as ERISA fiduciaries, they consistently have found attempts to assert liability on that basis unavailing. For example, the *Nieto* court affirmed the district court's dismissal of a claim against an attorney who allegedly rendered services to an ERISA plan in an improper and fraudulent manner. Because the complaint did not allege that the attorney had authority over plan assets, the court rejected the argument that he was an ERISA fiduciary, even though his dishonesty may have led to the dissipation of plan assets. 845 F.2d at 870-71; *see also Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991)

> he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of the plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(actuary was not fiduciary where there was no allegation that it had "actual decision-making power"); *Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988) (attorney and accountant who did not exercise actual control over management of plan not fiduciaries); 29 C.F.R. § 2509, 75-5 (1990) (actuary not fiduciary solely by virtue of rendering services to plan).

In their brief, the plaintiffs rely primarily on *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984). In *Monson*, the court upheld a district court's finding of liability for breach of fiduciary duties against the general manager of a plan sponsor. The district court noted that the manager had worked on relevant amendments to the plan, had consulted on the plan's behalf with independent experts regarding plan investments, had authority to issue press releases on behalf of the plan, and was responsible for informing employees about the plan. *Id.*

Monson is easily distinguishable from this case. Unlike the general manager in *Monson*, Hewitt was an independent actuary, not part of the plan sponsor's control group. Also, unlike the facts in *Monson*, the plaintiffs' allegations do not indicate that Hewitt had any control over the plan's operation or administration.

We conclude the district court correctly held that the plaintiffs' allegations failed to state a claim for breach of fiduciary duty under ERISA.

B. Claim for Knowing Participation in Breach of Fiduciary Duty

The plaintiffs argue that even if Hewitt is not a fiduciary, it still may be liable under ERISA if it knowingly participated in another's breach of fiduciary duty.

ERISA provides that any person who is a fiduciary to a plan who breaches any duty imposed by the statute is personally liable to the plan. 29 U.S.C. § 1109(a).[4] ERISA's civil enforcement section provides that a civil action may be brought by the Secretary or by a plan participant, beneficiary, or fiduciary for relief under section 1109. 29 U.S.C. § 1132(a)(2).[5]

In *Nieto*, we held that the plain language of section 1109(a) "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section." 845 F.2d at 871. We rejected the argument that a non-fiduciary could be liable under this section for knowing participation in a breach of fiduciary duty. *Id.*[6]

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[4] Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

[5] Section 1132 provides in relevant part:

> (a) A civil action may be brought--
>
> ...
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title ...

[6] We subsequently followed *Nieto* in *Call v. Sumitomo Bank*, 881 F.2d at 634-35.

Plaintiffs contend that we can and should overrule *Nieto* because Congress' enactment of the Omnibus Revenue Reconciliation Act of 1989 and its addition of a new enforcement provision to ERISA, 29 U.S.C. § 1132(1),[7] clarified Congress' intent to permit suits for knowing participation in a breach of fiduciary duty. Section 1132(1) gives the Secretary of Labor the power to assess a civil penalty against fiduciaries or other persons in certain amounts based upon any "knowing participation" in such a breach of fiduciary duty. The plaintiffs note that section 1132(1) refers to judicial proceedings brought by the Secretary under sections 1132(a)(2) or (a)(5). Section 1132(a)(2) in turn allows both the Secretary and plan participants to bring civil actions. The plaintiffs therefore conclude that because Congress in section 1132(1) gave the Secretary the ability to bring an action against non-fiduciary assistants under 1132(a)(2), it implicitly gave plan participants the same ability.

We reject this argument. The plain language of section 1132(1) applies to the Secretary only, not to plan participants.

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[7] Section 1132(1) provides in relevant part:

(1) In the case of --
(A) any breach of fiduciary responsibility ... or
(B) any knowing participation in such a breach or violation by any other person,
the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach ...
(A) pursuant to any settlement agreement with the Secretary, or
(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

"[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1984), quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979); *see also Nieto*, 845 F.2d at 872.

In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in *Nieto*. H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-70. We decline to do what Congress has refused to do.

C. Claim for Non-Fiduciary Violations of ERISA

The plaintiffs also argue that their first cause of action states a claim under 29 U.S.C. § 1132(a)(3), which provides that plan participants may seek equitable relief to redress violations of ERISA.[8] By this claim, the plaintiffs sought a recovery of money from Hewitt for its alleged improper acts.

The only way the district court could fashion an equitable remedy under ERISA to provide a monetary recovery for the plaintiffs against Hewitt would be to order restitution. The district court dismissed this claim, however, because the plaintiffs had not alleged that Hewitt received anything other than its compensation for actuarial services. We agree with

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[8] Section 1132(a)(3) provides in relevant part:

A civil action may be brought --
...
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

this analysis. Restitution was not available because unjust enrichment to support the plaintiffs' claim was not alleged.

Moreover, restitution requires that there be a direct link between the loss complained of and the recovery sought. *See Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 949-50 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (to make out a claim for restitution "it is usually necessary for the plaintiff to show that he conferred the benefit"). Here, no such link exists. The plaintiffs allege that Hewitt was paid by Kaiser, not from assets of the plan. It is not possible, therefore, to frame a claim for restitution in terms of the recovery of plan assets wrongfully obtained by Hewitt. *See United States ex rel. Youngstown Welding and Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986) (party who is not source of unjust enrichment is not entitled to restitution under Arizona law).

The plaintiffs argue that to the extent Kaiser was paying Hewitt, it was doing so as remuneration for breach of Hewitt's statutory duty and that all payments received by Hewitt were thus "unjust enrichment." The plaintiffs, however, have provided no authority that supports this theory. Moreover, to accept the plaintiffs' argument would be to obliterate the already blurry distinction between restitution and damages at law. Give that ERISA explicitly limits claims pursuant to subsection (a)(3) to claims for equitable relief, such an expansion would appear contrary to the spirit of the statute. *See Nieto*, 845 F.2d at 873 (permitting recovery of damages under subsection (a)(3) would render subsection (a)(2) superfluous, "a result contrary to a fundamental cannon of statutory construction").[9]

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[9] Even under this somewhat circuitous theory of unjust enrichment, the plaintiffs failed to allege Hewitt obtained anything from the plan.

We conclude that the district court did not err in dismissing the plaintiffs' non-fiduciary ERISA claim for restitution.

D. Pendent California Professional Malpractice Claim

The district court dismissed the plaintiffs' pendent professional negligence claim as time barred. The parties agree that California Code of Civil Procedure § 339(1), the two-year statute of limitations for professional malpractice, governs this pendent claim. The dispute is over when the claim accrued.

In California, the statute of limitations for a professional malpractice claim begins to run upon the occurrence of the last fact essential to the cause of action. "The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive the plaintiffs of a cause of action before they are aware that they have been injured." *Leaf v. City of San Mateo*, 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711, 715 (1980). This is generally known as the "discovery rule."

Where the "discovery rule" applies, "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 568, 661 (1988) (citation and footnote omitted). California courts have applied the discovery rule to professional malpractice cases. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98 Cal.Rptr. 837 (1971) (attorney malpractice); *Moonie v. Lynch*, 256 Cal.App.2d 361, 64 Cal.Rptr. 55 (1967) (accountant malpractice).

Hewitt does not contest that the discovery rule applies here. Rather it argues that the plaintiffs should have discovered

Hewitt's alleged wrongs in 1986, when the plan failed.[10] It argues that the plaintiffs had access to plan reports that would have alerted them to any actuarial improprieties. It asserts that certainly when the plan failed, the plaintiffs were on notice and should have obtained the reports that would have alerted them to the funding problems.

Hewitt's argument fails under California law. "[T]he question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact...[and] [i]t is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law." *Brown v. Bleiberg*, 32 Cal.3d 426, 436, 186 Cal.Rptr. 228, 233 (1982).

In *Baright v. Willis*, 151 Cal.App.3d 303, 198 Cal.Rptr. 510 (1984), the court refused to sustain a demurrer in a professional negligence case where the plaintiff's complaint did not show on its face that "in the exercise of due diligence plaintiff should have earlier discovered respondent's alleged negligence and failed to do so." 151 Cal.App.3d at 311, 191 Cal.Rptr. at 514-15. A demurrer on statute of limitations grounds is improper "where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." 151 Cal.App.3d, at 311, 191 Cal.Rptr. at 514,

[10] The plaintiffs' complaint alleged that "[i]n October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to the plaintiffs and other similarly situated PLAN participants and beneficiaries."

Even if, as the plaintiffs now claim, the PBGC made the determination in February 1987, the result is the same--the complaint was not filed until December 1989, two years and nine months after the later date.

quoting *Vassere v. Joerger*, 10 Cal.2d 689, 693, 76 P.2d 656, 653 [*sic*] (1938).

In the present case, the complaint does not show on its face that the plaintiffs should have discovered Hewitt's alleged negligence when the PBGC determined the plan to be severely underfunded and incapable of paying its liabilities. The PBGC may terminate a plan for a variety of reasons not premised on wrongdoing by either the plan fiduciaries or the plan's enrolled actuary. *See* 29 U.S.C. § 1342(a). *See also Pension Benefit Guaranty Corp. v. LTV Corp.*, __ U.S. __, 110 S.Ct. 2668, 2672-73 (1990) (plan sponsor entering bankruptcy). Reasonable minds can draw more than one conclusion from the circumstance of underfunding.

Thus, we reverse the district court's dismissal of the pendent state claim as barred by the applicable statute of limitations. The complaint does not show on its face that the plaintiffs were placed on a discovery inquiry as to Hewitt's alleged professional malpractice more than two years before the complaint was filed. On remand, the district court has discretion to allow the plaintiffs to pursue the pendent claim or to dismiss it. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

CONCLUSION

The district court's dismissal of the ERISA-based claims is affirmed. The district court's dismissal of the pendent state claim is reversed and remanded.

AFFIRMED in part, **REVERSED** in part and **REMANDED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The Secretary of Labor's Motion for Leave to File its Brief Amicus Curiae is granted. The brief, received by the clerk on November 18, 1991, is ordered filed.

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* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Norris and Thompson have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35 (b).

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* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ, *Plaintiffs*, v. HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan, *Defendants*.	No. C-89-4475-MHP **ORDER**

Plaintiffs bring this action for declaratory, injunctive and monetary relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. and include a pendent state claim. The parties are now before the court on defendant Hewitt's motions dismiss the complaint [*sic*] and to dismiss a cross-claim under Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

Plaintiffs, former salaried employees of the Kaiser Steel Corporation, filed this action on December 18, 1989, alleging that Hewitt Associates ("Hewitt") had violated certain provisions of ERISA and California law while acting as actuary

for the Kaiser Steel Retirement Plan ("Plan"). The court assumes the following allegations to be true, as it must for purposes of Hewitt's motion to dismiss.

Beginning in 1980, Kaiser radically restructured its business, ultimately curtailing and virtually eliminating its steel-making operations. Cplt. at 10. As a consequence of that curtailment, the number of employees who took early retirement, and were thus eligible for early retirement benefits, rose sharply. The early retirements, and related events resulted in significantly higher funding costs for the Plan which were not reflected in the actuarial assumptions employed by Hewitt.

Hewitt acted as actuary for the Plan from the Plan's inception in 1977 until the Plan was terminated in 1986. *Id.* at 3. Because of Hewitt's failure to alter its actuarial assumptions, Kaiser made substantially lower payments than necessary into the Plan. *Id.* at 4. Hewitt never disclosed those funding inadequacies in ERISA-prescribed documents or otherwise. *Id.* Hewitt also never disclosed that it was performing actuarial services for Kaiser at the same time as it performed these services for the Plan. *Id.*

In October 1986, the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation created under ERISA to administer the pension plan termination program, terminated the Plan after determining that the Plan was severely underfunded and incapable of paying its liabilities. *Id.* at 4-5. The PBGC is now the statutory trustee of the Plan. The retirement benefits of each of the plaintiffs and those similarly situated are considerably less under PBGC administration than those benefits to which they were entitled before the Plan was terminated. *Id.* at 5.

The termination of the Plan has resulted in several lawsuits by Plan members, three of which have been instituted before this Court. In the present action, plaintiffs allege that Hewitt's actions were a breach of "professional duties" to the Plan

created by ERISA, related regulations, and IRS regulations; that they constituted party-in-interest transactions in violation of ERISA section 406(a)(1), codified at 29 U.S.C. section 1106(a)(1); and that they constituted common law negligence. The PBGC and the Plan were named as defendants along with Hewitt.

Defendant Hewitt now enters motions for dismissal of the complaint and of the cross-claim of the PBGC.[1]

LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.), *cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning*, __ U.S. __, 108 S.Ct. 330 (1987).

DISCUSSION

Hewitt's motion to dismiss is based on several grounds. Defendant contends that the first and second counts of plaintiffs' complaint fail to state a claim upon which relief can be granted under ERISA. For count one, Hewitt maintains that no private right of action exists under ERISA for a so-called "breach of professional duties." For count two, Hewitt argues that plaintiffs have not properly alleged an unlawful party-in-

interest transaction. Finally, Hewitt argues that the statute of limitations bars all claims. The court will take up each of these contentions in turn.[2]

I. The Viability of the ERISA Claim for Breach of Fiduciary Duty

The complaint includes no explicit count for breach of fiduciary duty, but the plaintiffs ask the court to read such a claim into it. They argue that count one can be construed as stating a valid claim for breach of fiduciary duty against Hewitt. Such a claim can only survive if Hewitt, the Plan actuary, is deemed a plan fiduciary. For present purposes, a plan fiduciary is one who:

> exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or one who] has any discretionary authority or discretionary responsibility in the administration of such plan.
> (29 U.S.C. § 1002(21)(A).)

Absent a showing that they have moved beyond the realm of their ordinary duties, actuaries, attorneys and accountants are not plan fiduciaries. *Yeseta v. Baima*, 837 F.2d 380, 385 & n. 2 (9th Cir. 1988) (finding attorney and accountant not to be fiduciaries where they exercised purely ministerial duties); 29 C.F.R. § 2509.75-5 (1986) (actuary not fiduciary unless exercised control over management of plan or plan's assets).

Plaintiffs argue that if Hewitt controlled or had the authority to control the setting of actuarial assumptions, then Hewitt was a fiduciary. They maintain that the complaint's allegations that Hewitt was responsible for employing and changing actuarial assumptions are sufficient to make Hewitt a fiduciary. That argument must fail. Actuaries are statutorily bounds to employ actuarial assumptions in preparing statements for benefit plan

annual reports. 29 U.S.C. § 1023(d)(8). Moreover, actuaries must re-evaluate and possibly change assumptions on at least an annual basis, since their written statements are required yearly. The performance of these statutorily-prescribed duties does not render actuaries fiduciaries.

Plaintiffs cite no cases finding an actuary to be a fiduciary. The authority that they do cite is either too general or simply inapposite. In *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980), the defendant found to be a fiduciary was a company which administered employee benefit plans. The court found that the company provided a range of administrative and management services to the benefit plans at issue, including adjudicating medical claims, supervising a dental clinic and supervising the establishment of recordkeeping systems. "In each instance [the company] apparently possessed broad latitude in making awards, setting priorities, and performing other administrative tasks . . . . [The company] exercised far more than ministerial powers." *Id.* at 747. In the present case, by contrast, plaintiffs nowhere allege that Hewitt's role expanded beyond that of a typical actuary.[3] The other case plaintiffs principally rely upon for their argument that actuaries may be fiduciaries is also distinct from the present case. *Brock v. Self*, 632 F. Supp. 1509, 1520 (W.D. La. 1986) (pension plan servicing company, its executive officer and an employee all found to be fiduciaries because they rendered investment advice for a fee and exercised discretionary authority).

This court's decision that Hewitt's acts do not render it a fiduciary is supported by the few reported decisions directly on point. In *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162 (N.D. Ill. 1989), the court found that actuarial defendants who did nothing more than render professional services were not fiduciaries. Similarly, in the case at bar, taking all the complaints allegations as true, Hewitt did nothing more than negligently perform actuarial services.[4] In *Pappas v. Buck*, 1989 U.S. Dist. LEXIS 14767, (N.D. Ill.

Dec. 11, 1989), the defendant actuaries were accused of using the wrong yearly interest rate in computing their actuarial assumptions. The court stated:

> Defendants are accused only of giving faulty advice and professional services of a kind that do not involve exercising authority over the plan's assets . . . . We do not think that the rendering of professional actuarial service alone can render one an ERISA fiduciary. *See, e.g., Painters of Philadelphia Dist. Council v. Price Waterhouse*, 879 F.2d 1146, 1149-50 (3d Cir. 1989) [public accountant's audit of ERISA fund did not render accountant a fiduciary].

II. Viability of Claim for Knowing Participation in Breach of Fiduciary Duty

Plaintiffs also maintain that count one can be construed as alleging that Hewitt knowingly participated in breaches of fiduciary duties by Plan fiduciaries. Plaintiffs concede that the Ninth Circuit has explicitly ruled that no right of action exists under ERISA for damages against a non-fiduciary. *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988) (reaffirmed in *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989)). However, they argue that passage of the Omnibus Revenue Reconciliation Act in 1989 clarified Congress' intent to allow such actions. They contend that the amendments to ERISA codified at 29 U.S.C. section 1132(l), which require the Secretary of Labor to levy civil penalties against those who knowingly participate in breaches of fiduciary duty, demonstrate that Congress intended such individuals to be liable under 29 U.S.C. section 1109 all along.

This court will not engage in creative rewriting of the statute or of Ninth Circuit law by which it remains bound. The Ninth Circuit has clearly rejected aider and abettor or other non-fiduciary liability under section 1109.

III. Viability of Claim for Breach of Actuarial Duties

Plaintiffs also allege in their first cause of action that Hewitt breached professional duties imposed upon it by ERISA statutes and regulations and by Internal Revenue Service regulations.[5]

Plaintiffs concede, as they must, that their only viable avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under 29 U.S.C. section 1132(a)(3).[6] *Nieto*, 845 F.2d at 874. Plaintiffs' prayer for relief asks for an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from its breaches of ERISA." Cplt. at 12. Plaintiffs classify this as a prayer for restitutionary relief.[7] Opp. Mem. at 23.

Few reported cases have considered the availability of restitutionary relief under section 1132(a)(3). The parties have cited none. In the only reported appellate case on point, *United States Steel Mining Co. v. District 17 United Mine Workers*, 897 F.2d 149 (4th Cir. 1990), a company and its pension fund sought to recover benefits wrongly paid to employees in compliance with a state court injunction which was later invalidated. The defendants were the state court judge, the employee union and its members. The Fourth Circuit ruled that it was inappropriate for a federal court to grant relief under the circumstances because: 1) the damages sought were extra-contractual, in contradiction of the dictates of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and 2) the state court which issued the injunction was the best forum for relief. *United States Steel Mining Co.*, 897 F.2d at 153. In its denial of restitutionary relief for the case before it, the court rendered no opinion on the availability of such relief under section 1132(a)(3) in general.

Three district court cases have considered the issue before the court. In *Bartz v. Carter*, 709 F. Supp. 827 (N.D. Ill. 1989) the plaintiffs sought restitution from trustees who allegedly

converted a profit sharing plan into an employee stock ownership plan and gained control of the company, resulting in a substantial reduction in the value of plan assets. The court denied a motion to dismiss the claim, ruling that it was properly brought under section 1132(a)(3)(B)(ii). Although this court disagrees and considers such a claim properly brought under section 1132(a)(2) instead, the *Bartz* decision still serves as an example of judicial recognition of the restitutionary remedy under section 1132.

Further recognition of the remedy occurred in *Rochetti v. American Fed'n. of Musicians' and Employers' Pension Welfare Fund*, 1987 W.L. 12767 (N.D. Ill. Aug. 13, 1987) and *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980). In *Rochetti* musicians sought to recover payments made on their behalf into a benefits fund. They alleged that the payments violated the Labor Management Relations Act. The court recognized that restitution was an equitable remedy contemplated by section 1132(a)(3), but denied it to the plaintiffs because they did not seek to redress violations of ERISA.

In *Bittner*, the plaintiff alleged that he had been dismissed in retaliation for exercising his right to ERISA benefits. He sought back pay and reinstatement. In denying the defendant's motion to dismiss, the court observed that section 1132(a)(3) authorized equitable relief and stated, "[c]hief among the equitable remedies is the remedy of restitution." *Id*. at 536.

The above cases provide sufficient support for this court to grant restitutionary relief under section 1132(a)(3), in appropriate circumstances. However, the case at bar does not present such circumstances. Restitutionary relief must be predicated on some unjust enrichment. "[R]estitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep . . . ." Dobbs *Remedies*, § 4.1 at 224 (West 1978). In the case at bar there are no

allegations that Hewitt's purported violations have resulted in any benefit beyond its normal compensation as an actuary.

That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under sections 1132(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. 29 U.S.C. § 1242(b).

Because no claim exists on the alleged facts for breach of fiduciary duty, for knowing participation in breach of fiduciary duty, or for breach of "professional duties," the first cause of action in this case is dismissed.

IV. Viability of Claim for Unlawful Party-In-Interest Transactions

As a general rule, a claim under section 1132(a)(3) can be made for violations of the prohibited transaction sections of ERISA. *Nieto*, 845 F.2d at 873-74. Plaintiffs allege such a violation as follows in their second cause of action:

> Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408 [sic] [406 intended].
> (Cplt. para. 40.)

Plaintiffs attempt to bootstrap a right to relief for commission of prohibited transactions based on a separate claim for violation of actuarial duties. The second cause of action is

redundant. The violation of actuarial duties was alleged in count one. That violation cannot fairly be held to have rendered Hewitt's acceptance of otherwise reasonable compensation an additional actionable claim. Under the plaintiffs' scheme, any time a service provider was liable for an ERISA violation, both the provider and otherwise blameless plan fiduciaries would be liable for engaging in a prohibited transaction if the fiduciaries paid the negligent provider. Nothing in ERISA suggests such far-flung remedies.

Plaintiffs' reliance on *Nieto* is unavailing. The attorney defendant in *Nieto* allegedly was paid for services he never rendered, as opposed to being paid for services negligently rendered. *It*. at 870. The excess compensation was thus the basis for a valid claim of engaging in a prohibited transaction.

The plaintiffs' prohibited transaction claim is flawed for an additional reason. A prohibited transaction requires wrongful receipt of plan assets. 29 U.S.C. § 1106. The complaint alleges that Hewitt was paid for its services by Kaiser Steel, not by the Plan. Cplt. at para. 9. Thus, there was no prohibited transaction between Hewitt and the Plan within the meaning of section 1106. Plaintiffs' attempt at oral argument to tie the Plan to the source of funds for Hewitt's payment was nothing more than conjecture. Plaintiffs have failed to state a claim under ERISA for count two of the complaint and the count is dismissed.

V. Viability of Pendent Professional Negligence Claim

Plaintiffs concede that their third cause of action for professional negligence under state law is governed by the two-year statute of limitations of California Code of Civil Procedure section 339.1. Therefore, only those wrongful acts occurring in the two years prior to the filing of the suit on December 18, 1989 are actionable, unless tolling applies.

Plaintiffs contend that the statute did not begin to run until after the commencement of discovery in the related case of *Mertens v. Kaiser Steel Retirement Plan*, No. C-88-3587-MHP (N.D. Cal), which was filed in September 1988. They maintain that until then there was no "notice or information of circumstances to put a reasonable person on inquiry," *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 91988). They also cite other bases for tolling. *April Enterprises v. KTTV*, 147 Cal. App. 3d 805, 831 (1983) (statute tolled where the injury or the act causing injury has been difficult to discover); *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 125 (1975) (statute tolled until wrongful acts are discovered or with reasonable diligence could have been discovered).

The defendant argues that the statute began running at the time when the PBGC terminated the Plan after determining that it was "severely underfunded and incapable of paying its liabilities." Cplt. para. 19. They maintain that, since the PBGC made a determination of underfunding and terminated the Plan in October 1986, the plaintiffs then knew or should have known of the Plan's funding inadequacies. They contend that, in any event, once plaintiffs began receiving reduced benefits checks they were on notice of the need to discover the facts underlying the Plan's termination.

The court agrees with defendant. The allegations in the complaint regarding termination of the Plan in October 1986 due to underfunding establish that the statutory period commenced at that time. Since the action was not filed until December 1989, the negligence claim is barred.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant Hewitt's motion for dismissal of the complaint in its entirety. All federal claims in the complaint are DISMISSED for failure to state claims upon which relief may be granted. The statute of limitations has run on the pendent law state claim and it,

too, is DISMISSED. The court also GRANTS defendant Hewitt's motion for dismissal of the PBGC's cross-claim. Since the cross-claim is derivative of the fatally defective complaint, the cross-claim is DISMISSED.

Although defendant Hewitt's motion was not brought on behalf of the other two defendants, since no distinct allegations were directed against them, the PBGC and the Plan are also DISMISSED from the action.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge

1. In reference to the motion to dismiss the cross-claim of the PBGC, Hewitt argues, and the PBGC concedes, that the cross-claim must rise or fall with the complaint. Hewitt's arguments on its motion to dismiss are thus aimed at both the complaint and the cross-claim. Rather than file a memorandum rebutting Hewitt's arguments, the PBGC has joined in the plaintiffs' opposition to Hewitt's motion.

2. The resolution of the motion on substantive grounds renders it unnecessary for the court to consider the statute of limitations arguments.

3. Plaintiffs do allege, at paragraph 23 of the complaint, that "[i]nformation regarding the repeated meetings and other occasions when [Hewitt] . . . exercised defendant's fiduciary duties regarding [the Plan], or could and should have exercised those duties, is particularly within the knowledge of Hewitt." Complaint at para. 23. Plaintiffs apparently believe that they are thus freed from any responsibility to make more specific allegations of misconduct by Hewitt, pending discovery. However, the allegation that Hewitt knows more about what happened in meetings related to its actuarial duties than do the plaintiffs adds nothing. The court will not accept the notion that, because the plaintiffs do not know the specifics of Hewitt's activities, one can assume that those activities give rise to a fiduciary relationship.

4. Plaintiffs argue that the complaint also alleges that Hewitt acted in collusion with Kaiser. They cite no specific paragraph for this allegation and the court finds it nowhere. The closest allegation would appear to be paragraph 32 where plaintiffs allege that Hewitt either delegated the responsibility for selecting the Plan's actuarial assumptions to Kaiser or allowed Kaiser to do so "in order not to jeopardize its lucrative professional relationship with Kaiser." Cplt. at para. 32. From this allegation one cannot reasonably infer collusion with Kaiser, one can at most infer profit maximizing or perhaps greed on Hewitt's part.

5. The statutory duties referred to are set out at 29 U.S.C. sections 1023(a)(4)(B); 1023(d)(8), (10) and (13); and 1082(c)(3). The pertinent ERISA regulations, established by the Joint Board for Enrollment of Actuaries pursuant to 29 U.S.C. section 1242, are set out in 29 C.F.R. section 901.2. The I.R.S. regulations at issue are codified at 31 C.F.R. section 10.0 et seq.

6. On this point, the parties strive mightily against nonexistent targets. The defendant employs the factors of *Cort v. Ash*, 422 U.S. 66 (1975), to argue at length concerning the unavailability under ERISA of a private cause of action for damages against a non-fiduciary. Plaintiffs' belated concession renders that argument unnecessary. More curiously, the plaintiffs also apply *Cort v. Ash* to argue in favor of a cause of action already granted to them by statute.

7. Since the Plan was terminated long ago, and with it Hewitt's role as plan actuary, obviously injunctive relief is irrelevant.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

No. C-89-4475-MHP

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

ORDER

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein dismissing all claims,

IT IS ORDERED AND ADJUDGED that plaintiffs' complaint is DISMISSED as to all defendants, the Pension Benefit Guaranty Corporation's cross-claim is DISMISSED and this action is DISMISSED in its entirety.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge